Supreme Court, U.S.
FILED

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In the

# Supreme Court of the United States

WILLIAM AVERY,

*Petitioner,*

*v.*

HPCS, INC.,

*Respondent.*

Petition for a Writ of Certiorari to the
District of Columbia Court of Appeals

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

The Superior Court of the District of Columbia and the District of Columbia Court of Appeals erroneously used the doctrine of issue preclusion in precluding a complaint to be considered by a jury when the facts of the two separate complaints consisted of different allegations and involved different time periods. The lower courts took an unjustifiable interpretation of the doctrine. If the lower courts' opinions are affirmed, then a defendant could continue to cause harm to a plaintiff after a case has been resolved with no recourse. Moreover, creditors need to have a duty to report correct information since it has an impact of a person's privacy.

I. WHETHER THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA AND THE DISTRICT OF COLUMBIA COURT OF APPEALS ERRED IN ALLOWING A MOTION FOR SUMMARY JUDGMENT BASED ON ISSUE PRECLUSION AND DISMISSING THE PETITIONER'S COMPLAINT RESULTING IN A VIOLATION OF THE PETITIONER'S RIGHT OF A JURY TRIAL AND HIS DUE PROCESS RIGHTS UNDER THE UNITED STATES CONSTITUTION AFTER THE PETITIONER SUBMITTED PRIMA FACIE EVIDENCE THAT THE SECOND COMPLAINT CONSISTED OF FACTS AND ALLEGATIONS THAT WERE SEPARATE AND DISTINCT FROM THE FIRST COMPLAINT?

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## OPINIONS BELOW

The decision of the District of Columbia Court of Appeals dated March 13, 2003 affirming the Superior Court of the District of Columbia's Decision entering judgment as a matter of law in favor of the Respondent is set forth in the Appendix, p. 1a. The Decision of the Superior Court of the District of Columbia is set forth in the Appendix, p. 9a. The Order of the District of Columbia Court of Appeals denying the Petitioner's Petition for Rehearing En Banc dated June 30, 2003 is set forth in the Appendix, p. 16a.

## JURISDICTION

The statutory provision for this Court's jurisdiction is 28 U.S.C. Section 1254. The District of Columbia Court of Appeals affirmed the Superior Court of the District of Columbia's decision granting the Respondent's motion for summary judgment. The Petition for Rehearing En Banc was denied on June 30, 2003. This Petition is timely filed within the prescribed ninety-day period.

## RELEVANT PROVISIONS

*CONSTITUTIONAL PROVISIONS*

***Seventh Amendment, United States Constitution:***

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and not fact tried by a jury, shall be otherwise reexamined in any

> Court of the United States, than according to the rules of common law.

***Fourteenth Amendment, United States Constitution:***

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

## STATEMENT

Dr. William Avery, the "Petitioner", filed a Complaint for Damages in the Superior Court of the District of Columbia against HPCS, Inc., the Respondent, alleging defamation, intentional infliction of emotional distress, and harassment.

The Petitioner, a dentist practicing in the District of Columbia, purchased dental equipment from the Respondent in August of 1994. The Petitioner and Respondent agreed that the Petitioner would make monthly installment payments.

The Petitioner accused the Respondent for breach of contract, harassment, violation of District of Columbia Human Rights Act and questionable actions

and filed a lawsuit in 1995. The complaint alleged that the Respondent made bomb and gun threats against him.[1] The Respondent filed a counterclaim alleging breach of contract stemming from the Petitioner's lease of dental equipment and sought monetary damages in the amount of $7,834.84. The judge awarded the Respondent $7,834.84. The Petitioner's claims were heard by a jury. After a trial, the Petitioner was awarded $8,000.00 in damages for his claim of intentional infliction of emotional distress.

Even though the case was resolved and the Respondent's debt was satisfied in full, the Respondent reported thereafter $7,200.00 in delinquent debt to the credit bureaus and that the debt was submitted to collections.

The Petitioner did not know of the derogatory information on his credit until he attempted to refinance his home. Even after repeated requests, the Respondent failed to correct the inaccurate and derogatory credit information. The Respondent should have reported to the credit bureaus that the debt was "paid" or "satisfied". As a direct result of the negative credit information on his credit report by the Respondent, the Petitioner had to refinance at a substantially higher interest rate.

As a direct result of the Respondent's failure to report debt to the credit bureaus of a debt that was satisfied, the Petitioner filed a second complaint against the Respondent on January 13, 1998. The basis of the

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[1] After the Petitioner reported to the Respondent of the threats, the Respondent reduced his outstanding bill by $5,000.00. After the Petitioner filed a complaint, the Respondent claimed the entire balance due and reported the entire balance to the credit bureaus.

claims were the Respondent's failure to remove derogatory credit information from the Petitioner's credit report as of August of 1997, after the resolution of the action. The information was not corrected on his credit report until November of 1999.

The Respondent filed three different Motions for Summary Judgment. On June 12, 2000, the trial court found that the Petitioner was precluded from relitigating issues emanating from the first litigation because the trial court had previously granted judgment to the Respondent on its counterclaim. The trial court stated that the "defendant has established as a matter of law the truth of the credit report, and plaintiff's claim for deformation must fail." The court concluded that the debt was owed and thus it was proper to be reported to the credit bureaus as such and that the doctrine of issue preclusion/collateral estoppel prevented the second complaint to proceed.

The Petitioner appealed to the District of Columbia Court of Appeals alleging that the debt became satisfied in full at the time the debt was paid after the first complaint was resolved by a jury. Thus, the debt should have been reported as "satisfied". Since it was not, the Petitioner suffered damages caused by the Respondent unrelated to the damages awarded in the first complaint when his life was threatened by the Respondent.

The Appeals Court affirmed the lower court's opinion. Therefore, the Petitioner files this Writ of Certiorari requesting that this Honorable Court grant writ and review the merits of the case given that the Petitioner's constitutional rights have been violated.

## REASONS FOR GRANTING THE WRIT

### I. THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA AND THE DISTRICT OF COLUMBIA COURT OF APPEALS ERRED IN ALLOWING A MOTION FOR SUMMARY JUDGMENT BASED ON ISSUE PRECLUSION AND DISMISSING THE PETITIONER'S COMPLAINT RESULTING IN A VIOLATION OF THE PETITIONER'S RIGHT OF A JURY TRIAL AND HIS DUE PROCESS RIGHTS UNDER THE UNITED STATES CONSTITUTION AFTER THE PETITIONER SUBMITTED PRIMA FACIE EVIDENCE THAT THE SECOND COMPLAINT CONSISTED OF FACTS AND ALLEGATIONS THAT WERE SEPARATE AND DISTINCT FROM THE FIRST COMPLAINT.

A dismissal ought not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v Gibson*, 355 U.S. 41, 46 (1957). Dismissal with prejudice is a harsh sanction to be resorted to only in extreme cases and is within the court's sound discretion; court must give full regard for severity of the sanction, granting dismissal sparingly and only when less drastic alternatives have been explored. *Jones v. Smith*, 99 F.R.D. 4 (1983). Courts may not dismiss complaint for insufficiency unless it clearly appears that by no stretch of the imagination is plaintiff entitled to any relief for claims asserted in his complaint. *Kozlowski v. Ferrarra*, 117 F.Supp. 650 (1954). The Petitioner must be given the opportunity to present his case before the jury – no jury has had the opportunity to weigh the evidence of his allegations since the Superior Court of the District of Columbia

Court entered judgment as a matter of law based on the doctrine of issue preclusion prior to the case be deliberated by the jury. The Petitioner's claims are salient since the lower courts imposed no duty upon a creditor to correct information given to credit bureaus when it knew that the information was false.

## A. The lower courts denied the Petitioner's constitutional due process rights.

A complaint is not subject to dismissal unless it appears to certainty that a plaintiff cannot possibly be entitled to relief under any set of facts which could be proved in support of its allegations. *Pointer v. American Oil Co.*, 295 F.Supp.573 (1968).

Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care. *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935); *Chauffeurs, Teamsters and Helpers v. Terry*, 110 S.Ct. 1339, 1344-45 (1990). So vital is this great constitutional right that "it is only in exceptional cases and for specific causes that a party may be deprived of it. *Grand Chute v. Winegar*, 82 U.S. 373, 375 (1872); *Jacob v. New York City*, 315 U.S. 752, 752-753 (1942). The right of jury trial in civil cases at common law is a ...right so fundamental and sacred to the citizens that it should be jealously guarded by the courts". *Id.* The jury trial is not merely a procedural device, but, a fundamental right and an essential element of self government which the drafters of the Bill of Rights sought to preserve. To safeguard that right from judicial usurpation, the Seventh Amendment prohibits federal courts from taking away the role of the jury. Under

the United States Supreme Court's precedents as to whether there is a statutory or constitutional right to a jury trial on a civil claim under a federal statute, before the court inquiries into the applicability of the federal constitution's Seventh Amendment, the court must first ascertain whether a construction of the statute if fairly possible by which the constitutional question may be avoided; if there is no statute then it is a constitutional question. *City of Monterey v. DelMonte Dunes*, 526 U.S. 687, 119 S.Ct. 1624 (1999). Consistent with the textual mandate of the federal constitution's Seventh Amendment that the right to a jury trial be preserved in suits "at common law," the United States Supreme Court, in interpreting the Seventh Amendment, (1) asks whether the court is dealing with a cause of action that either was tried at law at the time of the founding or is at least analogous to one that was; and (2) if the action in question belongs in the law category, then asks whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791. *Id*; *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376, 134 L.Ed. 2d 577, 116 S.Ct. 1384 (1995). The Petitioner's case must fall to the jury in order to preserve his substantive right of the opportunity to be heard.

> It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear...that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record - as, for example, if

> it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered - the whole subject- matter of the action will be at large, and open to a new contention...

*Russell v. Place*, 94 U.S. 606, 608, 24 L.Ed. 214 (1877).

Moreover, the lower court's opinion is in direct conflict with *Commissioner v. Sunnen*, 333 U.S. 591 (1948), which held that a federal income tax case involving the same facts, questions and parties but different years was not conclusive under the collateral estoppel doctrine, but that the different years were a separate cause of action. The *Sunnen* case was reaffirmed in *Limbach v. Hooven & Allison*, 466 U.S. 353, 104 S.Ct. 1837 (1984). The United States Supreme Court has held that tax issues in separate years were separate causes of action and the collateral estoppel doctrine was inapplicable and the plaintiffs were allowed to have their cases heard by a trier of facts.

The second complaint alleged new charges and new damages based on new, separate and distinct malicious actions performed by the Respondent after verdict was entered in the first case. For two years and five months after the first case was completed, the Respondent committed to harm the Petitioner via misinformation on his credit report. Such facts caused irreparable damage to the Petitioner since a debt that should have stated "paid" or "satisfied" wrongfully reported "outstanding" with collection agencies. Facts of the Respondent's acts after the first case was

resolved were never litigated in the first cause of action and thus the second complaint should have never be collaterally estopped. Credit deformation **after** the first verdict was not determined by a jury. Summary judgment was inappropriately granted.

The trial court stated that the "defendant has established as a matter of law the truth of the credit report, and plaintiff's claim for deformation must fail." However, the lower courts failed to recognize that when the original case was resolved and the debt was satisfied, the relationship between the Petitioner and the Respondent should have ceased. However, the Respondent committed separate and distinct tort actions after the date of the first judgment. The facts from the second complaint arise from the Respondent's failure to remove inaccurate credit reporting. If the Respondent is not held liable for its "inaction", then there is no duty upon a creditor to report or correct information on a person's credit report. The Respondent knew that after the first complaint was resolved, it had a duty to correct the status of the debt with the credit bureaus. The Respondent failed to do this which caused the Petitioner separate and distinct damages (i.e. higher interest rate of his refinancing of his home and deformation as a result thereof). Obviously, since it involved a separate time period, separate facts as to the cause of deformation, and separate damages, the lower courts erroneously failed to allow a trier of fact to review and distinguish the facts.

Moreover, the Due Process Clause of the Fourteenth Amendment requires that a state prior to taking an action affecting an interest in property, provide notice that is reasonably calculated, under all

the circumstances, to apprise interested parties of the pendency of that action. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 195, 103 S.Ct. 2706, 2709, 77 L.Ed.2d 180 (1982); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950); Supreme Court's Construction of Due Process: 77 L.Ed.2d. 1485 (1999). In *Mullane*, the Supreme Court stated that the fundamental right protected by the due process clause is the right to adequate notice and an opportunity to be heard before any state action depriving one of life, liberty or property is accorded finality. The courts failed to protect the Petitioner's property – his credit which impacted his mortgage financing opportunities from being wrongfully taken from him after judgment entered in the first complaint.

The fundamental requisite of due process is the opportunity to be heard. Applying the fundamental principles of due process, it is readily apparent that the lower courts misapplied those basic constitutional concepts – the Petitioner was not given a reasonable opportunity to present his case from an arbitrary or unjust appropriation. Instead judgment was entered as a matter of law so that the salient issues of what Respondent did after the completion of the first case could not be examined by a trier of fact.

The lower courts erred in not allowing the Petitioner's second complaint to be heard. The courts deemed that since there was a deformation count in both complaints, then collateral estoppel barred the second complaint. However, a further review of the facts of the underlying cases would have proven that the counts of the separate complaints were based on separate and distinct facts. If the lower courts' opinions

are affirmed then there is no accountability imposed upon a creditor to report accurate or correct information to credit bureaus.

**B. The Respondent must be held liable for its continuous reporting of bad credit after the original action had been resolved.**

The Petitioner had never been given the opportunity to pled his theory of liability or to argue the facts alleged in his second complaint. Even though the derogatory credit report resulted from an unpaid balance of a lease, the issue of damages from the first and second complaints were separate and distinct.

A right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction cannot be disputed in a subsequent suit between the parties. *Montana v. United States*, 440 U.S. 147, 153 (1979); *United States v. Mendoza*, 464 U.S. 154 (1984). The parties are precluded from relitigating issues that were or could have been raised in the original case. *Federated Dep't Stores v. Moitie*, 452 U.S. 394, 398 (1981). In order to constitute estoppel, the same point must be put in issue, upon the record, and directly found by the jury. *See McDonald v. Bear Briver and Auburn Water and Mining Co.*, 15 Cal. 145 (1860). Issue preclusion may generally prevent the relitigation in a court action of issues of fact previously decided in a court of competent jurisdiction if: 1) there is identity of the parties and of the issues; 2) the parties had an adequate opportunity to litigate the issues in the first proceeding; 3) the issues to be estopped were actually litigated and determined in the first case; and 4) findings on the issues to be estopped were necessary to the first case. Restatement (Second) of Judgments Section 27

(1982). The lower courts never addressed the essential point of the second lawsuit, that is, deformation **after** the verdict and the full payment of the debt. It was impossible for the first court to render an award of damages for future deformation.

The lower courts failed to abide by the District of Columbia's and the United States Supreme Court's requisite analysis, that is whether: "the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action" in the second action. *See Parkland Hosiery Co., v. Shore*, 439 U.S. 322, 99 S.Ct. 645 (1979). In order for a claim of collateral estoppel to succeed, the issue in the new case must be one that was actually litigated and decided in the prior case, by a final and valid disposition on the merits, after a full and fair opportunity for litigation by the same parties or their privies, where the issue was necessarily decided in disposing of the first action, and not mere dictum. *Major v. Inner City Property Management*, 653 A.2d 379 (D.C.App. 1995); *Smith v. Jenkins*, 562 A.2d 610, 617 (D.C. 1989).

The Petitioner accused the Respondent for breach of contract, harassment, violation of District of Columbia Human Rights Act and questionable actions in the 1995 lawsuit for the time period of August 1994 to 1995. The second complaint in January of 1998 alleging defamation, intentional infliction of emotional distress, and harassment covered the period from the date of the judgment of the first cause of action when the debt was "satisfied" until the date the Respondent fixed the credit reporting. Thus, the covered time periods and the causes of actions were separate and distinct. The allegations of the second complaint occurred as a direct result of facts that occurred after the completion of the

original case. The Petitioner could not have possibly "settled" or "litigated" the facts of deformation for inaccurate credit reporting after a debt had been satisfied since the facts had not yet occurred. There was no damages sought for deformation of post-verdict since the Petitioner or the court were unaware that the debt would continue to be reported as outstanding until after the completion of the first case.

The burden is on the party asserting preclusion to show actual decision of the specific issues involved. 18 C. Wright A. Miller & E. Cooper, Federal Practice and Procedure Section 4420, at 185 (1981). In addition, when the record does not clearly disclose the grounds on which first decision was based, that decision cannot be given collateral estoppel effect. *Woodbury v. District of Columbia*, 67 App.D.C. 278, 280, 92 F.2d 202, 204 (1937). The Petitioner was awarded for intentional infliction of emotional distress of acts that occurred in 1994 – not for deformation for acts that occurred commencing in August of 1997.

When a prior judgment does not indicate clearly what issues were resolved the result is that the opaque judgment fails to preclude relitigation. Wright & Miller, *supra*, Section 4420; *Board of County Supervisors v. Scottish & York Insurance Services, Inc.*, 763 F.2d 176, 179 (4th Cir. 1985). In *Major v. Inner City Property Management*, Inc., 653 A.2d 379 (1995), the District of Columbia Court of Appeals reversed the Superior Court's decision holding that it must be clear that the issues were "necessarily decided". Issue preclusion is not appropriate if the burdens of proof in the relevant jurisdictions are different. *Ringgold v. District of Columbia Dep't of Employment Services*, 531 A.2d 241 (1987). Of course the separate causes of actions had

separate and distinct burdens and elements to be proved. The prima facie evidence was separate. The Petitioner's argument is supported by not only civil cases but bankruptcy cases.

In a bankruptcy action, collateral estoppel applies only if the first court made specific, factual findings on the identical dischargeability issue in question – that is, an issue which encompassed the same prima facie elements as the bankruptcy issue – and the facts supporting the court's findings are discernible from that court's record. *In re Elizabeth A. Nolan*, 220 BR 727 (1998). The lower courts adopted its own version of collateral estoppel and a clear comparison of the first judgment with the second complaint demonstrates that it would be impossible for the first judgment to include acts that occurred after the judgment was entered. As a consumer, the Petitioner's credit was erroneously tampered with causing severe hardship.

Furthermore, consumer protection is a traditional and important component of the police power of the states. *Griffith v. Connecticut*, 218 U.S. 563, 568-69 (1910); *California v. ARC American Corp.*, 490 U.S. 93, 101 (1989). Typical areas of state consumer credit regulation include requirements of truthful advertising, restrictions or prohibitions on automatic wage assignments or authorizations to confess judgment, limitations on security interests and restrictions on debt collection charges and practices; *Aldens, Inc. v. Miller*, 610 F.2d 538 (8th Cir. 1979), *cert. denied*, 446 U.S. 919 (1980). The lower courts failed to protect the Petitioner from debt collection practices that occurred after the judgment. There must be strict standards to mandate a creditor to report and fix the

accuracy of any debt.

A trier of fact would have been able to review that the first complaint was based on murder and bomb threats by the Respondent and its agents. The second complaint was based on inaccurate credit reporting after a debt was resolved with the Respondent. Thus, collateral estoppel should have never been an issue before the trial court. The Ninth Circuit has held that credit report errors alone were sufficient to justify an award of damages. *Gulmond v. Trans Union Credit Information Co.*, 45 F.3d 1329 (1995) Thus District Court of Columbia had rendered a conflicting decision with another circuit. Thus, this Honorable Court must reconcile the differences in the Circuit Courts and allow this Petition for Writ for Certiorari.

## CONCLUSION

The District of Columbia Court of Appeals and the Superior Court of the District of Columbia erred in analyzing the separate and distinct facts of the Petitioner's two complaints and the time periods that they covered. By granting a motion for summary judgment based on the doctrine of issue preclusion, the lower courts allowed a creditor to continue to report derogatory credit information after the original case was resolved causing severe hardship to the Petitioner. Creditors should have the duty to report correct delinquencies since the negative information results in the violation of a person's privacy information, a clear violation of due process rights.

The Court should grant *certiorari* to review this important matter and order that the Petitioner has a constitutional right to pursue his allegations before a

trier of fact.

Respectfully submitted,

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No. 00-CV-1315
CA280-98

District of Columbia Court of Appeals

WILLIAM AVERY,
Appellant,

v.

HPCS, INC.,
Appellee.

I.

(A)

Appellant filed a civil action against appellee in August 1995 alleging defamation, intentional infliction of emotional distress, and violation of the District of Columbia Human Rights Act.[1] The case arose out of events surrounding appellee's attempts to collect an overdue balance regarding the lease of equipment from appellee. In response, appellee filed a counterclaim for the overdue balance. Following a trial, a jury returned a verdict on July 30, 1997 in favor of appellant for $8,000.00. On August 7,1997 the court, however, entered judgment in favor of appellee in the amount of $7,834.94 on the counterclaim. Neither party appealed.

In January 1997, six months before the jury trial in the pending case, appellant attempted to refinance his house. Appellant learned at this time that his credit report reflected an unpaid debt to appellee. Appellant testified during trial that he owed a sum of money on the

leased equipment and had not made the payments. The information regarding appellant's delinquency remained on his credit report until 1999, although the overdue balance was satisfied subsequent to the entry of the judgments in July and August.

On January 13, 1998, appellant filed a second complaint against appellee, again alleging defamation and intentional infliction of emotional distress. He also alleged harassment. [2] He asserts in the latter complaint that appellee was the cause of inaccurate entries in his credit report in January 1997, pending the earlier trial, resulting in financial injury to him at that time.

(B)

In the main, the trial judge concluded that appellant's assertions in the present case were governed by the doctrine of "issue preclusion." [3] The judge noted:

...Plaintiff has testified under oath that, as of July, 1997, his debt to the defendant was unpaid. More importantly, the Court in the first litigation determined, after a full and fair opportunity to be heard, that the plaintiff owed the defendant $7,834.94. This finding was essential to a determination of defendant's counterclaim, it was embodied in a final judgment, and the issue was actually litigated. Thus, under the doctrine of issue preclusion, plaintiff is now barred from asserting in this litigation that he did not have an unpaid debt to the defendant at the time of the credit report. . . . [P]laintiff's claim for intentional infliction of emotional distress also must fail. To prove that claim, the plaintiff must prove among other things that the defendant's conduct in making the information available for inclusion in the credit report was 'extreme and outrageous conduct.' Jonathan Woodner Co. v. Breeden, 665 A.2d 929, 935 (D.C.1995). If

the information was true, as the Court held as matter of law it was, then defendant's conduct could not have been extreme and outrageous. . . . [F]or reasons discussed above, defendant's conduct in this case cannot as a matter of law be the predicate for a harassment claim.

Accordingly, the trial judge granted the motions for summary judgment as to all three claims, on the basis of issue preclusion, and this appeal followed.

II.

Appellee's motion to the court presented familiar questions of summary judgment. Super. Ct. Civ. R. 56. In reviewing the grant of such a motion, it is settled that a reviewing court must view the record and asserted facts in light most favorable to the non-moving party. Sayan v. Riggs Nat'l Bank of Washington, D. C., 544 A.2d 267, 268 (D.C.1988). It is similarly true, under the rule, that the non-movant must counter material allegations of fact with sworn assertions of specific facts to avoid summary resolution. Paul v. Howard Univ., 754 A.2d 297, 305 (D.C. 2001). "Conclusory allegations are not enough to establish a genuine issue of material fact." Id.

In the instant case, appellant alleges in his second complaint that "derogatory information" caused him to pay a higher interest rate in order to refinance his residence in January 1997. There is no other allegation of this kind in his complaint. In response to a second motion for summary relief, appellant then asserted, in opposition to the motion, that the "derogatory information" remained in his report even after the "disputed monies were paid." Noticeably missing from appellant's opposition are any sworn averments of facts relating to the failure to remove the satisfied debt from

the report causing any subsequent specific resultant injuries.

Appellant's repetitive presentation of his second case is at center of the trial judge's ruling. The doctrine of claim preclusion or res judicata prevents a plaintiff "from relitigating the same claim or any claim that might have been raised in the first proceeding." Washington Med. Ctr. v. Holle, 573 A.2d 1269,1281(D.C.1990). Issue preclusion renders conclusive in the same or subsequent action determination of an issue of fact or law when (1) the issue is actually litigated and (2) determined by a valid, final judgment on the merits; (3) after a full and fair opportunity for litigation by the parties . . .; (4) under circumstances where the determination was essential to the judgment, and not merely dictum.

Id. at 1283.

Notwithstanding the sense of grievance which appellant expresses in this second action, we conclude the trial judge did not err in granting summary judgment because the critical facts surrounding the debt were actually litigated, determined and reduced to judgment after full opportunity to be heard. Appellant, without acknowledging the outcome of the first litigation, has created a revised theory of liability delving back to issues already decided. The amount of the lease arrearage is not now disputed, nor was it disputed at trial. That question has been adjudicated adversely against him. With regard to subsequent alleged injuries attributable to failure to remove the questioned credit report, appellant has not pled such a theory of liability in his complaint, nor has he joined issue on a factual basis as to an alleged subsequent injury in opposing summary judgment. At bottom, appellant's pleadings are not only deficient as to allegations of fact, but premised on a

theory of liability which evolved as the case progressed. Even under a theory of pleadings and practice which is less than strict, we cannot expect the judge or opposing counsel to remedy the deficiencies for appellant.

We conclude therefore that the trial judge did not err in ruling that summary judgment was warranted in this case. Accordingly, the judgment on appeal is hereby affirmed.

So ordered.

SCHWELB, Associate Judge, dissenting: I regret that I am unable to agree with the majority's affirmance of the judgment. In my opinion, the effect of the trial court's decision is to treat the earlier lawsuit between the parties as dispositive of events that had not yet occurred at the time of the disposition of that suit. I must therefore respectfully dissent.

I agree with the court that insofar as Dr. Avery's second complaint can be construed as dealing only with the period prior to July 1997 (when Dr. Avery paid for the equipment), his action is barred by the doctrine of issue preclusion (collateral estoppel). I also agree that the second complaint is inartfully drawn and does not reveal that there has been a change of circumstances, namely, that the previous debt has been satisfied.

In his opposition to HPCS' motion for summary judgment, however, Dr. Avery alleged that

[f]urther, after the judgment had been entered against Plaintiff in July 1997 and the disputed monies were paid, Defendant HPCS continued to report adverse credit information and to improperly report such information and thereby continued to prejudice Plaintiff and his

ability to obtain credit until November 1999 when Defendant HPCS had such derogatory and defamatory information removed from Plaintiffs credit report.

(Emphasis in original.) This allegation about events that occurred in the second half of 1997, in 1998, and in 1999, could not have been precluded by the prior action, because the first case was decided in July 1997. At that time, the alleged continuation of the defamatory reporting of Dr. Avery's credit from July 1997 to November 1999 had not yet happened.

The court could not foresee in July 1997 that HPCS would fail for 2½ years to record on its books Dr. Avery's satisfaction of his debt. A fortiori, the court could not determine in advance the legal consequences of HPCS' alleged failure to reflect Dr. Avery's payment of what he had previously owed.

The majority's response to these realities is as follows:

With regard to subsequent alleged injuries attributable to failure to remove the questioned credit report, appellant has not pled such a theory of liability in his complaint, nor join[ed] issue on a factual basis as to subsequent injury in opposing summary judgment.

It is true that the complaint does not include the central allegation contained in his opposition, and that Dr. Avery has filed no affidavit or other admissible document showing that he suffered injury, after July 1997, as a result of the ensuing 2½ years of erroneous reflection of the status of Dr. Avery's former debt. As to the July 1997 - November 1999 period, however, the defendant has not filed any contrary affidavit either, so the record is limited to the pleadings and Dr. Avery's opposition to the motion for summary judgment. In my

opinion, we should treat that opposition as an elaboration on Dr. Avery's complaint. Although Dr. Avery's counsel would have been well advised to include in his complaint the factual allegations contained in his opposition, our Rules of Civil Procedure, like the Federal Rules, "reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome . . . ." Conley v. Gibson, 355 U.S. 41, 48 (1957). It therefore seems to me that under these circumstances, we should not dispose, on the pleadings alone, of a factual allegation that Dr. Avery's credit was defamed for 2½ years after he satisfied his debt. If his credit was so defamed for so long a period, there is a substantial possibility that he suffered injury.

In the present context, and in the absence of affidavits or similar materials that go beyond the pleadings (at least as to the period in dispute), HPCS' motion for summary judgment is, for all practical purposes, equivalent to a motion for judgment on the pleadings, or to a motion to dismiss for failure to state a claim upon which relief may be granted. For purposes, of such a motion, the plaintiff's allegations must be treated as true, Vincent v. Anderson, 621 A.2d 367, 372 (D.C.1993), and Dr. Avery is therefore entitled to present his case to a trier of fact. Accordingly, I would reverse the award of summary judgment in HPCS' favor and remand the case for trial.

Even if Dr. Avery's opposition to HPCS' motion of summary judgment is not treated as a de facto amendment of the complaint, it is evident from that opposition that Dr. Avery is now making an allegation regarding post-July 1997 events which is not subject to issue preclusion on the basis of the earlier lawsuit. Under these circumstances, if the complaint is deemed

inadequate because it lacks that allegation, the appropriate disposition is dismissal of the complaint without prejudice, or with leave to amend, rather than summary judgment on the merits. Such a disposition would enable Dr. Avery to submit relevant allegations to a fact-finder, so long as these allegations were timely made, and will avoid deciding the case on the basis of counsel's misstep in pleading.[4]

FOOTNOTES

[1] D.C. Code § 1-2501 (1981).

[2] D.C. Code § 22-504 (b) (1981).

[3] See Washington Medical Center v. Holle, 573 A.2d 1269, 1283 (D.C. 1990).

[4] In that regard, I express no opinion as to whether a new or amended complaint would relate back, or as to whether Dr. Avery's new claim would be time-barred.

Civil Case No. 98ca280

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

WILLIAM AVERY Plaintiff,

v.
HPCS, INC.
Defendant.

June 12, 2000

MEMORANDUM AND ORDER

Before the Court is Defendant's Second Amended Motion for Summary Judgment and the plaintiff's opposition.

This is an action seeking damages on three claims: defamation, intentional infliction of emotion distress, and harassment. The gist of the complaint that the defendant defamed the plaintiff by causing to be placed on plaintiff's credit report the information that plaintiff owed $7,200 to the defendant. The alleged debt resulted from a lease of dental equipment by the defendant. Pla ntifff claims that defendant's causing the debt to be placed on the credit report caused him damages in his inability to receive credit and his having to pay a higher interest rate on a loan than he otherwise would have had to pay. Plaintiff also claims emotional distress arising from the defamation and from the alleged intentional infliction of emotional distress and harassment. The latter two counts are also based on the allegation that the defendant caused to be placed on the

plaintiff's credit report the defamatory statement regarding the debt owed.

In Civil Action No. 6822-95, the plaintiff brought an action against the same defendant. That action alleged defamation, intentional infliction of emotional distress and a violation of the District of Columbia Human Rights Act. The conduct allegedly constituting these violations arose out of the defendant's lease of dental equipment to the plaintiff. The defendant filed a counterclaim, alleging that the plaintiff owed it $7,834.94 for the lease of the dental equipment.

The joint pre-trial statement in No. 6822-95 stated, in relevant part, as follows:

C. Nature of the Case

Plaintiff, William Averly[,] is a dentist practicing in the District of Columbia. [HCPS] is a corporation in the business of leasing medical equipment. In 1990, Plaintiff agreed to be jointly and severally liable on certain dental equipment that had been originally leased to Dr. Cyril Davidson. Plaintiff subsequently became in arrears and there were various attempts to restructure his payment agreement. Defendant, John Scarpaci was and is an employee of HPCS. Plaintiff after a revised payment schedule was made became in arrears again and Scarpaci called him in reference to the payment.

Plaintiff alleges that he was defamed by defendant Scarpaci as agent for HCPS when Scarpaci reported to the United States Postal Service that in a telephone conversation Avery told Mr. Scarpaci he was sending Mr. Scarpaci a letter bomb, and if called back he would take a gun and kill him. Plaintiff, African American, contends that these remarks were also racially

discriminatory and constituted intentional infliction of emotional distress.

Counterclaim

Defendant HPCS seeks monetary damages in the amount of $7834.84 for the balance due and owning for equipment that was leased by Plaintiff as a. counterclaim.

It was stipulated in the Joint Pretrial Statement that "Avery . . , agreed to assume joint and sever[al] liability on a lease of deal equipment from HPCS." Plaintiff did, however, dispute that he owed $7,834.84 to the defendant.

At trial, the Court made a finding for the defendant on the counterclaim in the sum of $7,834.94. The plaintiff's claims were submitted to the jury, and the jury found for the plaintiff against the defendant on the claim of intentional infliction of emotional distress, and made an award of $8,000. No party appealed.

After the complaint in the present case was filed, the defendant filed a motion for summary judgment on the ground or res judicata or claim preclusion. The Court denied the motion, concluding that there was a genuine issue of material fact as to whether the plaintiff could have filed the present claims, based as they are on information put in a credit report, when plaintiff averred that he had not known of the credit report until "years after the filing of the first lawsuit.". The Court denied a motion for reconsideration, which was based on evidence not submitted with the first motion.

At the pretrial conference, defense counsel pointed to a transcript of the trial (now appended to the Amended

Motion for Summary Judgment) in which the plaintiff under oath stated that, as of the time of the testimony (July, 1997), there was still a balance due and owing to the defendant. He was asked. "So, whatever H. P. [C. S.] says your bill is, you owe it?" He answered, "Yes. . . ." When informed that this testimony would provide at least part of the basis for the defendant's defense of truth as against the defamation action, the Court stated that it would allow the defendant to file a new motion for summary judgment asserting that it was entitled to judgment as a matter,of law because it had established that there was no genuine issue of material fact on whether, at the time of the credit report, plaintiff was in debt to the defendant.

Plaintiff has now filed a new motion for summary judgment. It relies not only on the testimony of the plaintiff, but on the Court's finding for the defendant on its counterclaim in the first litigation in the amount of $7,834.94.

Before addressing the merits, the court addresses plaintiff's argument that defendant should not be granted another opportunity to seek summary judgment. The Court sees no unfairness to the plaintiff. The Court retains the discretion to modify the scheduling order "upon a showing of good cause." Rule 16(b) (6). Here, the plaintiff at the pretrial conference notified the Court and the opposition of an issue that, if decided in defendant's favor, would dispose of the case. The defendant produced evidence supporting its position, and it appeared to the Court that the issue could be raised by way of a summary judgment motion without undue or wasteful expenditure of time and resources. In addition, the defendant does not raise an issue already decided. In the prior motion for summary judgment, defendant asserted a defense of res judicata, or claim

preclusion. That defense asserts that the plaintiff is "barred . . . from relitigating the same claim or any claim that might have been raised in, the first proceeding." Washington Medical Center v. Holle, 573 A. 2d 1269, 1281 (D.C. 1990). In the present motion, defendant asserts a defense on the merits of the case. It is true that, in doing so, it invokes the doctrine of "issue preclusion" (though it does not call it that), in arguing that the truthfulness of whether or not plaintiff was in debt has already been decided by the Court in the earlier litigation in finding for the defendant and against the plaintiff on the issue of whether the defendant was entitled to contract damages on its counterclaim for failure to make payments for. the leased equipment.

Issue preclusion, in contrast to claim preclusion, renders concludive in the same or subsequent action determination of an issue of fact or law when (1) the issue is actually litigated and (2) determined by a valid, final judgment on the merits; (3) after a full and fair opportunity for litigation by the parties...; (4) under circumstances where the determination was essential to the judgment, and not merely dictum.

Id. at 1283. Issue preclusion thus differs from claim preclusion. Hence, defendant is not by the present motion seeking simply to relitigate an issue the Court already has decided against it. Accordingly, the Court proceeds to a discussion of the merits.

In an action for defamation, the "plaintiff has the burden of proving that the challenged action is both false and defamatory." Kendrick v. Fox Television,659 A. 2d 814, 819 (D.C. 1995). Plaintifif has testified under oath that, as of July, 1997, his debt to the defendant was unpaid. More importantly, the court in the first litigation determined, after a full and fair opportunity to be heard,

that the plaintiff owed the defendant $7,834.94. This finding was essential to a determination of defendant's counterclaim, it was embodied in a final judgment, and the issue was actually litigated. Thus, under the doctrine of issue preclusion, plaintiff is now barred from asserting in this litigation that he did not have an unpaid debt td the defendant at the time of the credit report. Thus, defendant has established as a matter of law the truth of the credit report, and plaintiff's claim for defamation must fail.

In his opposition, plaintiff argues that newly discovered evidence shows that he was not the sole owner of the equipment. This contention has no relevance in view of the finding made against the plaintiff in the first litigation. In any event, the plaintiff stipulated in the first litigation that he was jointly and severally liable on the leased equipment. He cannot be heard now to argue that he was not. Any claims he has to upset the judgment in the first litigation must be addressed to the Court in that litigation.

In view of the foregoing, plaintiff's claim for intentional infliction of emotional distress also must fail. To prove that claim, the plaintiff must prove among other things that the defendant's conduct in making the information available for inclusion in the credit report was "extreme and outrageous conduct." Jonathan Woodner Co. v. Breeden, 665 A.2d 929, 935 (D.C. 1995). If the information was true, as the Court held as matter of law it was, then defendant's conduct could not have been extreme and outrageous.

Plaintiff also includes a count for harassment. Harassing conduct might be actionable as a tort derived from D.C. Code § 22-504 (b) , but otherwise this Court has knows of no tort of "harassment." In any event, for the reasons

discussed above, defendant's conduct in this case cannot as a matter of law be the predicate for a harassment claim.

For the foregoing reasons, the Court ORDERS that the Defendant's Second Amended Motion for Summary Judgment is GRANTED and FURTHER ORDERS that the Complaint be and hereby is DISMISSED WITH PREJUDICE.

SIGNED IN CHAMBERS

A. Franklin Burgess, Jr.
Judge

June 12, 2000

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No. 00-CV-1315
CA280-98

District of Columbia Court of Appeals

WILLIAM AVERY,
Appellant,

v.

HPCS, INC.,
Appellee.

June 30, 2003

BEFORE: Wagner, Chief Judge; *Terry, Steadman, *Schwelb, Farrell, Ruiz. Reid, Glickman, and Washington, Associate Judges; *Pryor, Senior Judge.

ORDER

On consideration of appellant's petition for rehearing or rehearing en banc, it is ORDERED by the merits division* that the petition for rehearing is denied; and it appearing that no judge of this court has called for a vote on the petition for rehearing en banc, it is

FURTHER ORDERED that the petition for rehearing en banc is denied.

PER CURIAM

Associate Judge Schwelb would grant the petition for rehearing.

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